No. 89-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. and C.M.F.,
A Tribal Indian Mother and Her Minor Child,
Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

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QUESTIONS PRESENTED

1. In a state court adoption proceeding involving the voluntary termination of parental rights to an Indian child, can the Indian tribe's jurisdictional and other rights guaranteed in the Indian Child Welfare Act (25 U.S.C. §§ 1901-1961) and confirmed in *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, 109 S. Ct. 1597 (1989), be evaded by the simple device of never notifying the tribe of the existence of the proceeding?

2. Does a state court's failure to provide notice to an Indian child's tribe, prior to the termination of parental rights to that child and its adoption into a non-Indian home, violate the tribe's rights of due process under the Fourteenth Amendment to the United States Constitution by denying it the opportunity to protect the interests of the tribe in the welfare of its children, as confirmed in *Mississippi Choctaw Band of Indians v. Holyfield*, —— U.S. ——, 109 S. Ct. 1597 (1989)?

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The Cook Inlet Tribal Council, and C.A.A. and C.M.F., an Indian mother and her minor child, petition this Court for a writ of certiorari to review the judgment of the Alaska Supreme Court in *Catholic Social Services, Inc., C.G. and S.G. v. C.A.A. and Cook Inlet Tribal Council*, Case No. S-2879, Op. No. 3534, (Alaska Supreme Court, December 8, 1989).

OPINIONS BELOW

The opinion of the Alaska Supreme Court (Pet. App. at 1a-9a) is reported at 783 P.2d 1159 (Alaska 1989). The opinion of the Alaska Superior Court for the Third Judicial District (Pet. App. at 14a-16a) is not reported.

JURISDICTION

The opinion of the Alaska Supreme Court, which constitutes its judgment, was entered on December 8, 1989. On February 27, 1990 Justice O'Connor granted petitioners' application for an extension of time and extended the time for filing this petition to and including March 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Sec. 1:

> No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

Indian Child Welfare Act of 1978, Secs. 2-4, 101, 103-105, and 109, 25 U.S.C. §§ 1901, 1902-1911, 1913-1915, 1919 (1988) (Pet. App. 19a-27a).

STATEMENT OF THE CASE

This case concerns the right of an Indian tribe to be notified when a private adoption agency institutes proceedings in state court for voluntary termination of a tribal mother's parental rights to her Indian child for ultimate adoption into a non-Indian home. In this petition the Indian mother, her child and her tribe join in challenging the adoption agency's and the pre-adoptive non-Indian parents' actions as contrary to the Indian Child Welfare Act and the U.S. Constitution.

A. Facts

Petitioner C.A.A. is an Athabascan Indian mother of three children and is a member of a Regional Corporation as defined in 43 U.S.C. § 1606 of the Alaska Native Claims Settlement Act. Pet. App. at 11a.[1] She is the natural

[1] The majority *per curiam* decision below does not set forth the facts. The dissenting opinion and the probate master's recommended decision on intervention (adopted by the Superior Court) both do so, and for convenience petitioners refer to the facts as set forth therein wherever possible.

mother of petitioner C.M.F., born in 1980.[2] C.M.F.'s natural father (J.M.F.) is also a Native American and a tribal member of the Aleut Community of St. Paul Island, Alaska. Petitioner Cook Inlet Tribal Council is the mother's and thus the child's tribe. For purposes of the Indian Child Welfare Act, and as determined below, C.A.A. is an "Indian," C.M.F. is her "Indian child" and the Cook Inlet Tribal Council is the "Indian child's tribe." 25 U.S.C. § 1903(3), (4)-(5); CR at 34-35, 48.[3]

Respondent Catholic Social Services ("Catholic Services") is a private religious adoption agency which offers a variety of counseling programs and is involved in arranging the adoption of minor children into families deemed by Catholic Services to be qualified. Over the years Catholic Services has been regularly involved in the adoption of Native American children. Most (if not all) of these children have been permanently placed with non-Indian families. Glaser Depo. at 12. Respondents Mr. and Mrs. G. are the non-Indian pre-adoptive family with whom C.M.F. presently resides. Pet. App. at 5a.

In July, 1985, C.A.A. first sought assistance from Catholic Services to help her address problems stemming from alcoholism. *Id.* at 3a. Shortly thereafter, she surrendered all parental rights to her eldest child, and Catholic Services placed him in a non-Indian adoptive home. Glaser Depo., Exhibit 1 at 10.

Catholic Services encouraged C.A.A. to next give up custody of her second child, petitioner C.M.F., who was

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[2] C.M.F. is represented in this matter by the State of Alaska, Office of Public Advocacy, the state agency which has been designated by the Alaska State Legislature to provide legal representation for children as counsel and or guardian ad litem in adoption, child abuse and neglect cases and in child custody proceedings. Alaska Stat. 44.21.410(a).

[3] "CR," "TR," and references to depositions are all citations to the record on appeal before the Alaska Supreme Court. CR refers to the clerk's pleadings record. TR refers to the transcript record.

then five years old. C.A.A. was reluctant to do so.[4] When in June, 1986 C.A.A. finally agreed, Catholic Services began a procedure which, as explained below, was effectively designed to keep her from being able to change her mind.

On June 30, 1986, at Catholic Services' request, the Alaska Probate Court held a relinquishment hearing to comply with section 1913 of the ICWA. At the hearing C.A.A. was told she would only have ten days to reconsider her decision (pursuant to Alaska law), despite the ICWA's provision in section 1913(c) that a mother has until the final decree to withdraw her consent. TR at 8. Among the conditions imposed by Catholic Services prior to and at the hearing was that C.A.A. retain physical custody of her daughter throughout this period. Catholic Services was clearly concerned that C.A.A. would change her mind if she had to physically give up her five-year-old child before the decree became final. CR at 71, Glaser Depo. at 83. C.A.A. thus relinquished control on paper only.[5]

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[4] In April, 1986 C.A.A. relinquished physical custody over C.M.F. to Catholic Services. Catholic Services then placed C.M.F. in a non-Indian home. In May, 1986, C.A.A. demanded her child be returned. Glaser Depo., Exh. 1 at 6-11. Catholic Services complied but thereafter provided no further social services to C.A.A. Glaser Depo. at 77; *see also* C.A.A. Depo. at 80; CR at 71. Services were not resumed until June, 1986 when C.A.A. agreed to relinquish her daughter. Glaser Depo., Exh. 1 at 12.

[5] At no time was C.A.A. ever informed that the "relinquishment" procedure, as opposed to a "consent to adoption" procedure, would leave her with no rights to determine what family would adopt her child. CR at 6-7, 71; Glaser Depo. at 154-157, 168. Under Alaska law, and as anticipated in the ICWA, 25 U.S.C. § 1913(a), (c), an adoption can be accomplished directly in one step through a "consent to adoption" procedure, Alaska Stat. 25.23.060 (1983), or it can be accomplished in a two-step relinquishment-adoption procedure which cuts off the parent's rights at the first step, long before an adoption petition is filed. Alaska Stat. 25.23.180(a) (1983). Catholic Services always uses the two-step relinquishment-adoption procedure.

Although C.A.A. advised Catholic Services she was indifferent to her family learning of the relinquishment proceedings, neither the extended Indian family nor the Cook Inlet Tribal Council were notified that the proceedings were underway. Glaser Depo. at 37-38, 165. Nor did Catholic Services inform C.A.A. of the existence of Cook Inlet Tribal Council's array of programs and support services designed to assist Indian women and mothers like C.A.A. These were standard Catholic Services practices. CR at 71.

Only on July 11, 1986, eleven days after the relinquishment hearing, was C.A.A. asked to surrender her child to Catholic Services. As she had been repeatedly told, C.A.A. then understood her child's fate was cast in stone and that, despite her second thoughts, she no longer had the right to revoke her consent. TR at 8; C.A.A. Depo. at 69. The Superior Court decree terminating C.A.A's parental rights was entered July 15, 1986. Pet. App. at 17a.

C.M.F., then five years old, was placed with the G's as a preadoptive placement. No "good cause" finding to place C.M.F. outside the ICWA's presumptive placement scheme was ever made under 25 U.S.C. § 1915(b), nor was the Cook Inlet Tribal Council or her father's tribe (the Aleut Community of St. Paul Island), ever contacted regarding tribal placement preferences under 25 U.S.C. § 1915(c).

Shortly thereafter, C.A.A. began to put her life back together. She became involved with a local church in July or August, 1986, where church members helped her cope with her drinking problem. C.A.A. Depo. at 118-119. In September she stopped drinking and began outpatient alcohol treatment. In early 1987, C.A.A. learned of the Cook Inlet Tribal Council's programs and services through a television advertisement. She contacted the tribe for counseling and for assistance in regaining custody of her daughter. Pet. App. at 4a.

In March, 1987, eight months after the preadoptive placement, the G's petitioned to adopt C.M.F. They filed their petition in the relinquishment proceeding, rather than commencing a new action.[6] C.A.A. filed a Revocation of Relinquishment. The Cook Inlet Tribal Council heard of the petition through C.A.A. and moved to intervene. The superior court granted the intervention motion on the probate master's recommendation.[7] Pet. App. at 10a-12a, 13a.

B. Proceedings Below

In July, 1987, C.A.A. filed a motion requesting that the superior court set aside the decree of termination of parental rights. CR at 37. The Cook Inlet Tribal Council filed a separate petition pursuant to 25 U.S.C. § 1914 of the ICWA to set aside the decree. CR at 78-79; Pet. App. at 5a. Both C.A.A.'s motion and the Tribal Council's petition averred, *inter alia*, that the relinquishment was invalid due to Catholic Services' failure to provide notice of the termination proceeding to the child's tribes. They maintained that the Indian Child Welfare Act provides an Indian child's tribes with a federal statutory right to notice prior to the termination of an Indian's parental rights to the child. They also maintained that the right to notice is so essential to the protection of a tribe's interests in its children that the due process clauses of the Constitution of the United States and the Constitution of the State of Alaska mandate a right to notice independent of the Indian Child Welfare Act. CR

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[6] Had they filed a separate action, the adoption petition might have entirely escaped C.A.A. and the Cook Inlet Tribal Council, since not even C.A.A. would have been a party to the new proceeding and it is clear Catholic Services had no intention of notifying them.

[7] The order permitting intervention was never appealed by respondents. The Alaska Supreme Court, however, held tribal notice of the proceedings was not required because in its opinion, tribes have no right of intervention in such proceedings.

at 57-59, 83-95, 115-127. The guardian ad litem for C.M.F. concurred. CR at 351.

In November, 1987, the probate master recommended denial of C.A.A.'s and the Tribal Council's petition to vacate the termination decree on the grounds that under the ICWA tribes have no right to notice of voluntary parental rights termination proceedings. On June 24, 1988, the superior court rejected the report and ruled that the failure to provide notice of the termination proceedings to the Tribal Council violated the ICWA, and on that basis vacated the termination decree. Pet. App. at 15a-16a. Superior Court Judge Carlson ruled:

> The tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe, in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding.

Pet. App. at 15a.

Respondents appealed to the Alaska Supreme Court. The appeal dealt strictly with the issue of a tribe's right to notice of a state court proceeding for the voluntary termination of parental rights to an Indian child. On December 8, 1989, a divided Alaska Supreme Court reversed the decision of the superior court. Pet. App. at 1a-9a. In a *per curiam* opinion a four-Justice majority held that tribes have no right to notice of voluntary termination proceedings involving tribal children. The majority appears to have grounded its decision on the erroneous conclusion that tribes lack any right to intervene in such proceedings, despite the plain language of 25 U.S.C. § 1911(c) and § 1903(1)(ii) of the ICWA.[8] In

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[8] The court below never cited section 1911(c). It ruled "Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings." Pet. App. at 2a.

dissent, Justice Rabinowitz concluded that the Indian Child Welfare Act provides tribes with the right to notice and the right of intervention in all termination proceedings, be they "voluntary" or "involuntary."

REASONS FOR ISSUING THE WRIT

Four reasons require the issuance of a writ of certiorari to review the decision of the Alaska Supreme Court: (1) the direct conflict with this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, 109 S. Ct. 1597 (1989); (2) the deprivation of the tribe's fundamental right of due process; (3) the conflict with other states' practices on the interpretation of a federal statute; and (4) the critical importance of this case to all Native American tribes both within and outside Alaska.

I. The Decision of the Alaska Supreme Court Directly Conflicts with this Court's *Mississippi Choctaw* Decision Upholding Indian Tribal Jurisdictional and Substantive Rights in Voluntary Adoption Proceedings.

Congress in the ICWA and this Court in *Mississippi Choctaw* noted the devastating effect visited upon Indian tribes, tribal families and their children by an epidemic of adoptions of Indian children into non-Indian homes, often by private adoption agencies. 25 U.S.C. §§ 1901(4) and (5); 109 S. Ct. at 1599-1601, 1606, 1608-1610. In response to this crisis, Congress and this Court recognized the essential role of Indian tribes in adoption proceedings involving tribal children, and the special role Indian tribes play in preventing their children from being lost to their communities and extended Indian families. 25 U.S.C. §§ 1901(2)-(5); 109 S. Ct. at 1600-1602, 1606, 1608-1610.

In so doing, this Court rejected a transparent effort by the Mississippi Supreme Court to evade tribal involvement in such matters by artificially manipulating an Indian infant's place of birth, and thus its domicile. Now a majority of the Alaska Supreme Court, deliberately ignor-

ing *Mississippi Choctaw*,[9] has permitted a new strategy for evading tribal rights in Indian child adoption cases: it has condoned a private agency's practice of never even notifying tribes of the existence of adoption proceedings involving tribal children, thus effectively nullifying *all* the tribal rights accorded under the ICWA. The majority opinion below is in irreconcilable conflict with the principles supporting this Court's *Mississippi Choctaw* decision.[10]

The court below rested its ruling that tribes are not entitled to notice of voluntary termination cases otherwise covered by the ICWA on the single ground that no tribal right of intervention attaches to such proceedings:

> The sole issue presented in this case is whether under the Indian Child Welfare Act an Indian child's tribe is entitled to notice of a proceeding for voluntary termination of parental rights. We answer this question in the negative. *Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. Compare* 25 U.S.C.A. 1912(a) with 25 U.S.C.A. 1913 (West 1983).

Pet. App. at 2a (emphasis added). Yet, the court never cited to the intervention provision of the ICWA which plainly states otherwise:

> In *any* State court proceeding for the * * * *termination of parental rights* to an Indian child, * * * the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1911(c) (emphasis added). Proceedings for the "termination of parental rights" specifically include "*any*

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[9] Although the *per curiam* decision below contains no reference to *Mississippi Choctaw*, the dissent does. The case was brought to the court's attention by Petitioners in a letter brief dated April 17, 1989, pursuant to Rule 212(c)(12) of the Alaska Rules of Appellate Procedure.

[10] Perhaps because of this fact, the majority opinion below fails to even cite, much less discuss, *Mississippi Choctaw*.

[state] court action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii). This Court expressly pointed to these very provisions, wholly ignored below, in support of the Mississippi Choctaw Band's intervention in an identical voluntary termination-adoption proceeding. 109 S. Ct. at 1603 n.12.[11]

The conflict between the decision below and the statute, as interpreted by this Court, could not be more patent. The statute clearly states a tribe has a right to intervene

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[11] The legislative history cited in footnote by the majority below does not support the proposition for which it is offered. Pet. App. at 2a, n.2. *See Indian Child Welfare Act of 1978: Hearings Before the Subcommittee on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978) ("House Hearings"). Chief Isaac of the Mississippi Band of Choctaw Indians spoke clearly in favor of notice. *Id.* at 63. Mary Jane Fales, Director of the ARENA project, testified in part against proposals authorizing tribal courts to request transfer of state court cases involving non-reservation domiciliaries over the wishes of the Indian parents. *Id.* at 143-144. Her concerns were addressed in section 1911(b). Ms. Fales also opined that tribal notice in voluntary state adoption cases should turn on whether or not the parents are reservation domiciliaries. *Id.* Subcommittee Chairman Roncalio and Senate Select Committee for Indian Affairs counsel Peter Taylor firmly rejected the suggestion as unacceptable and the Act reflects no such provision or distinction. *Id.* at 144. Sister Mary Clare of Catholic Social Services of Alaska directed her testimony, *id.* at 85-90, to the need for confidentiality in the provisions regarding disclosure of adoption records and in placement provisions governing adoptive, foster care and preadoptive placements. Such concerns are reflected in the provisions of section 1915(c) and in section 1917. Sister Clare also urged Congress to go further, and to absolutely bar any tribal notice or any tribal or statutory involvement in placement decisions. *Id.* at 87; *see also* prepared statement of Sister Clare in the Committee's files, referred to *id.* at 87, where on page 3 of the attached exhibit Sister Clare commented that the tribe "should not be notified over the objections of the natural parents" because doing so "would be a serious breach of confidentiality." Despite Sister Clare's suggestion the ICWA contains no such parental veto provision; House Hearings at 89 (remarks of Mr. Taylor). *Compare* 25 U.S.C. § 1911(b) (parental veto over tribal court transfers).

in any termination proceeding, including a voluntary relinquishment proceeding. If, as decided below, a tribe does not have a right to notice of the proceeding and an opportunity to respond, then as the superior court and dissenting Justice Rabinowitz noted, the right to intervene in such cases, like ICWA's other tribal rights, "prove illusory" [12] and are "hollow and without practical effect." [13]

Mississippi Choctaw speaks directly to the powerful tribal interests in state court proceedings involving the adoption of tribal children by non-Native families. As noted by the Court, those tribal interests are a direct product of the devastating impact such adoptions typically have, not only on the tribal community, but most importantly on the Indian child, an impact often most painfully experienced beginning with the onset of adolescence. 109 S. Ct. 1600-1601, 1609. Through the ICWA Congress directly sought to curb such tragedies, and to address the "impact of adoptions on the tribes themselves" by providing for the direct involvement of tribes in all adoption cases involving tribal children. *Id.* at 1609.

Recognizing that occasionally Indian parents are seemingly voluntary participants in the adoption of their own children into non-Native homes, Congress recognized the Indian child's tribe has distinct and powerful interests in the child's adoption that are "on a parity with the interests of the parents." 109 S. Ct. at 1610 (*quoting In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986). This interest finds expression in "[t]he numerous prerogatives accorded the tribes through the ICWA's substantive provisions." 109 S. Ct. at 1609. In the ICWA these rights prevail "even in cases where the parents consented to the adoption, because of concerns going beyond the individual wishes of parents." *Id.*

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[12] Pet. App. at 9a.

[13] Pet. App. at 15a.

Within this framework, this Court firmly rejected an attempted, albeit inconvenient, "expedient" by Indian parents to dodge a tribe's interests by giving birth to their child off the reservation and thereafter seeking to voluntarily place their baby for adoption through a state court. In so acting, the Court blocked the efforts of the Indian parents and the Mississippi courts to make an end-run around the powerful tribal rights given expression in the ICWA. Yet, the device championed by Catholic Services and the G's, and condoned in the Alaska Supreme Court's majority opinion, is considerably more "expedient" than the inconvenience of travelling off a reservation to give birth, for it requires but "two pieces of paper": a parental consent form and a judge's *pro forma* certificate that the parent "fully understood" the consequences of her consent. Pet. App. at 9a. In this manner, the ICWA is "readily circumvented," *id.*, and all the tribal rights accorded therein are lost.

In *Mississippi Choctaw*, this Court detailed the full panoply of tribal rights recognized in the ICWA, and emphasized the critical importance of those rights in the context of voluntary adoptions of Indian children into non-Indian homes. The Court specifically noted the jurisdictional provisions of sections 1911(a) and 1911(b), the former confirming exclusive tribal jurisdiction over those adoption cases (like *Mississippi Choctaw*) arising in Indian country, and the latter establishing a modified *forum non conveniens* rule for other adoption cases (as in the case at bar) arising outside Indian country. 109 S. Ct. at 1609. The Court noted that the tribal intervention provision of section 1911(c) applies to state court proceedings involving the voluntary termination of parental rights to an Indian child. And the Court noted a series of other equally important rights, including the right to petition to invalidate state court action (sec. 1914), the right to alter the presumptive placement priorities applicable in state court (sec. 1915(c)), the right to obtain records (sec. 1915(e)), and the authority to con-

clude jurisdictional and other agreements with states (sec. 1919). 109 S. Ct. at 1603, n.12, 1609. All these rights give expression to the powerful interests of Indian tribes in the fate of their children.

How is a tribe to exercise its precious rights in matters involving its children if the tribe does not know a proceeding exists? How is a tribe to assert its section 1911(a) prerogative of exclusive jurisdiction over Indian country domiciliaries, and over tribal court wards, if it never learns a state court proceeding is underway? How does it go about requesting transfer under section 1911 (b) of other cases when it is unaware the case exists in the first place? How does it intervene under section 1911 (c) in a case about which it knows nothing? And how does it participate in defending, setting, or changing the preadoptive placement priorities of section 1915(c), or in participating in a "good cause" hearing to deviate from those priorities under section 1915(a) or (b), if it has no knowledge any placement is underway? Simply put, the opinion below creates a "Catch-22" in which those cases most demanding tribal intervention escape it entirely.

Notice is an integral part of the ICWA. Without notice, the whole Act unravels. Without notice, the Mississippi Choctaw Band, absent inadvertent disclosure,[14] may never learn of a case over which it, alone, may have exclusive jurisdiction. Likewise, without notice here the Cook Inlet Tribal Council is barred from counseling a tribal family through the crisis that has brought it to the brink of a five-year-old Indian child's adoption into a non-Indian home, and it is barred (if an adoption is to occur) from having any say, any voice, any opinion,

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[14] In *Mississippi Choctaw* the Band never received notice of the adoption proceedings from the mother, the court or the adoptive couple; it learned of the case inadvertently through the concerns of the biological grandmother.

over who the adoptive parents will be. The majority opinion below cuts the heart out of the ICWA, rendering its tribal rights empty and totally nullifying this Court's *Mississippi Choctaw* decision.

For the Indian child at the center of the adoption, the decision below is even more portentous. Without tribal notice a state court may go forward and, as in *Mississippi Choctaw*, issue a decree that is entirely void for lack of jurisdiction. Like a time bomb, years may pass before the defect is discovered and, with that discovery, the child is faced with the possibility of being torn away from its adoptive family and thrown into chaos.[15] Tribal notice is an inconsequential price to pay—a simple piece of paper and a twenty-five cent stamp—for the security of the child's ultimate placement.

The Alaska Supreme Court's decision both ignores and directly conflicts with *Mississippi Choctaw*. In three short paragraphs it wipes out the most critical of rights guaranteed under the ICWA and leaves state courthouse doors wide open to the continued removal of tribal children into adoptive homes, beyond the reach of tribal authorities. Review by this Court is essential to protect the Court's decree in *Mississippi Choctaw*.

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[15] The consequences for the child may be equally severe where, as here, no "good cause" hearing, sec. 1915(a), is held to place an Indian child into a non-Indian home until many months or years have passed. At this point changing the child's placement may be severely disruptive. It should be added, however, that in such circumstances state court judges typically view the short-term trauma of breaking the psychological bond which has developed between child and non-Indian family (particularly where an Indian parent has concurred) as outweighing the high potential for psychological disruption later in the child's life. Participation at the final adoptive stage, without earlier participation, is therefore often meaningless.

II. The Decision of the Alaska Supreme Court Denies Tribes Substantive Rights in the Welfare of Tribal Children Without Due Process of Law.

To deny Indian tribes notice in the face of their substantial interests in their children is to deny them their fundamental rights of due process. As this Court has noted in a somewhat different context:

> [The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right they must first be notified"). Procedural due process here mandates notice and an opportunity to be heard. *See Bell v. Burson*, 402 U.S. 535, 542 (1971); *Mullane*, 339 U.S. at 314-315.

Mississippi Choctaw demonstrates that the inherent and statutory interests of tribes in the adoption of tribal children are "legitimate" and sufficiently substantial to merit due process protections. *Board of Regents v. Roth*, 408 U.S. 564, 577-578 (1972). *See Mississippi Choctaw*, 109 S. Ct. at 1600-1602, 1603, n. 12, 1606, n. 18, 1608-1610; *Santosky v. Kramer*, 455 U.S. 745, 753-754 (1982); *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27 (1981); *Fisher v. District Court*, 424 U.S. 382, 386-388 (1976); *United States v. Quiver*, 241 U.S. 602, 605-606 (1916). Surely, those interests are sufficiently powerful to require notice before state judicial proceedings occur which may substantially affect, impair or destroy those interests. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, ——, 108 S. Ct. 896, 900 (1988); *Boddie v. Connecticut*, 401 US. 371, 377-378 (1971). Accordingly, this Court should grant review to protect the rights of Indian tribes, as a matter of fundamental due process,

to receive notice of adoption proceedings where substantial tribal interests are at stake.

III. The Decision of the Alaska Supreme Court Directly Conflicts with Other States' Practices.

The Alaska Supreme Court's majority opinion largely leaves to chance when, if at all, a tribe will learn of a state court voluntary adoption proceeding involving a tribal child.

If the tribal mother relinquishes her parental rights to a private adoption agency or directly to the adoptive parents, no tribal notice will be given. If the tribal mother relinquishes her parental rights to the State of Alaska, the child's tribe will receive notice.[16]

If, as in *Mississippi Choctaw*, the mother is in Mississippi, again no notice would apparently be sent and, as in that case, the child's tribe would only find out by inadvertence, luck or the deliberate act of some individual close to the adoption proceeding. Yet, if the same mother finds herself in Oklahoma, North Dakota or Utah, notice apparently *would* be sent to the child's tribe. *See Duncan v. Wiley*, 657 P.2d 1212, 1214 (Okla. Ct. App. 1982); *B.R.T. v. Executive Director of the Social Service Board of North Dakota*, 391 N.W.2d 594, 595 (N.D. 1986); *In re Adoption of Halloway*, 732 P.2d 962, 963 (Utah 1986). If she resides in Washington State the child's tribe will receive notice. Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240 (1) (West Supp. 1989). The same is true in Minnesota and Michigan. Minn. Stat. Ann. 257.353(2), (3) (West Supp. 1990); Mich. Court Rules 5.980(A). And in some states, as in California, it appears at least some tribes

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[16] This will change if the State elects not to continue its past practice, pursuant to its prior interpretation of federal law, of notifying tribes. Brief of the State of Alaska, Department of Health and Social Services as *Amicus Curiae* before the Alaska Supreme Court in the proceedings below.

will learn of voluntary adoption proceedings indirectly, as part of the process for verifying that a tribal Indian child is involved. *In re Junious M.*, 144 Cal. App. 3d 786, 793, 193 Cal. Rptr. 40, 43-44 (1983) *citing Dept. of the Interior Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584, 67586 (Nov. 25, 1979); California Dept. of Social Services All County Letter No. 89-26 at 5 (Mar. 24, 1989). Other states merely repeat the language of ICWA without further elaboration on the notification procedures, leaving open the possibility that they, like Mississippi, do not notify tribes.

Clearly, the decision below conflicts with the practices of some states, and is consistent with others. The result is a chaotic lack of national uniformity. Surely Congress cannot have intended that a tribe's interests in the welfare of its tribal children would differ, that its substantive rights would vary—and essentially not even exist—depending either on the state in which the tribe is located or the state court in which the termination-adoption proceedings are initiated. Congress intended there be national uniformity in the ICWA's notice requirements, and sought to prohibit the very forum shopping which will surely follow from the Alaska Supreme Court's decision. Review by this Court is essential to reconcile the practices of the several states in the interpretation of this critical federal law and thus resolve this conflict among the states.

IV. The Decision of the Alaska Supreme Court is of Grave Importance to All Tribes Across the Nation.

This case is not confined to Native Alaskan children and Native Alaskan tribes, for no aspect of the decision below is (nor could it be) unique to Alaska. The decision rests directly on the court's interpretation below of the ICWA, nothing more. Until the issue is firmly put to rest by this Court, it thus holds the potential for substantial precedential impact on the practices of other states' public and private child placement agencies.

One California superior court judge already has ruled that a tribe with prior notice of a voluntary Indian adoption nonetheless cannot intervene in the adoption proceeding to press for enforcement of section 1915's placement priorities, a result in direct violation of *Mississippi Choctaw*. In reaching its decision, the California court relied solely upon the *per curiam* decision below. *In re the Matter of Baby Girl Argleben*, Case No. AD53227 (Cal. Sup. Ct., Orange Co., Feb. 21, 1990) (record decision). Other courts will follow. In addition to its precedential impact in other states, tribes outside Alaska will also be immediately and directly affected by application of the decision to the substantial number of Native Americans from non-Alaska tribes who reside in Alaska.

State courts traditionally hostile to tribal rights can be expected to seize upon the opinion below as a means of furthering the very cultural bias favoring well-to-do Caucasian homes which Congress expressly sought to counter in the ICWA. 109 S. Ct. at 1602. Review by this Court now is urgent to block this growing erosion of tribal rights in the futures of their tribal children.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted. In light of the patent and irreconcilable conflict between the *per curiam* decision below and this Court's decision in *Mississippi Choctaw*, and the Court's failure to consider either that case or 25 U.S.C. § 1911(c), it is also respectfully suggested that this Court act summarily to either reverse the Alaska Supreme Court decision or to vacate and remand the case for further proceedings consistent with *Mississippi Choctaw* and Section 1911(c).

Respectfully submitted,

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March 29, 1990

* Counsel of Record

APPENDIX

APPENDIX

SUPREME COURT OF ALASKA

S-2879

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,
Appellants,

v.

C.A.A. and COOK INLET TRIBAL COUNCIL,
Appellees.

Dec. 8, 1989

Robert B. Flint, Hartig, Rhodes, Norman, Mahoney & Edwards, Anchorage, for appellants.

Michael Gershel, Tred Eyerly, and Carol Daniel, Alaska Legal Services Corp., Sharon Gleason, Reese, Rice & Volland, Anchorage, for appellee C.A.A.

Lloyd Benton Miller, Sonosky, Chambers, Sachse & Miller, Anchorage, for appellee Cook Inlet Tribal Council.

Philip J. McCarthy, Jr., Deputy Public Advocate, Brant McGee, Public Advocate, Anchorage, for guardian ad litem.

D. Rebecca Snow, Asst. Atty. Gen., Fairbanks, Grace Berg Schaible, Atty. Gen., Juneau, for Amicus Curiae, State of Alaska, Dept. of Health and Social Services.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

The sole issue presented in this case is whether under the Indian Child Welfare Act [1] an Indian child's tribe is entitled to notice of a proceeding for voluntary termination of parental rights. We answer this question in the negative. Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. *Compare* 25 U.S.C.A. § 1912(a) with 25 U.S.C.A. § 1913 (West 1983).

The legislative history of the Act demonstrates that this was a considered choice by Congress. Witnesses testified on both sides of the question whether notice should be required.[2] Additionally, the Bureau of Indian Affairs interpretative guidelines confirm the correctness of our view: "The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones." Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, at 67586 (1979).

The appellees' contention that due process requires tribal notice lacks merit. In enacting the Indian Child Welfare Act, Congress has both created and defined tribal rights in adoption and termination proceedings. The provisions of the Act which give tribes the right to notice of certain proceedings and not to others, define the scope of tribal rights. The Act strikes a balance between the some-

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[1] 25 U.S.C.A. §§ 1901-1963 (West 1983).

[2] *See* testimony of (1) Chief Calvin Issac, Mississippi Band of Choctaw Indians, in *Indian Child Welfare Act of 1978: Hearings Before The Subcommittee on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. 62-65 (1978); (2) Mary Jane Fales, North American Center on Adoption, *Id.* at 141-148; and (3) Sister Mary Clare, Catholic Social Services of Alaska, *Id.* at 80-90.

times conflicting interests of Indian parents, Indian children, and their tribes. We are unable to say that the fact that Congress stopped short of granting tribes the right to notice in voluntary termination proceedings is fundamentally unfair.

The judgment is REVERSED and this case is REMANDED for further proceedings.

RABINOWITZ, Justice, dissenting.

The Indian Child Welfare Act of 1978 (ICWA) explicitly grants tribes the right to intervene in any State court proceeding for the termination of parental rights to an Indian child. 25 U.S.C. § 1911(c). This right to intervene is fundamental to the ICWA's purpose, and confers upon tribes an implicit right to notice of any proceeding within the Act's scope. To hold otherwise is to misread the Act. I therefore dissent.

I. FACTUAL BACKGROUND.

Review of the record reveals the following compelling facts.

In August 1980 an Athabascan mother, CAA, gave birth to a child, CMF. In July 1985 CAA approached Catholic Social Services (Catholic Services) for help with alcoholism and parenting skills. CAA thereafter relinquished custody of a second child, M.[1] and in April 1986 allowed Catholic Services to place CMF in foster care. In May 1986, however, CAA elected not to relinquish her parental rights to CMF, and CMF was returned to her. In June 1986 CAA informed Catholic Services that she had decided again to "give up" CMF. CAA asked Catholic Services to remove CMF from her home "as soon as possible." CAA was drinking heavily at this time and had subjected her child to physical abuse.

[1] CAA's relinquishment of M is not on appeal.

On June 30, 1986 CAA appeared before a probate master in a voluntary relinquishment proceeding. CAA indicated that she wanted CMF to be adopted by the Caucasian couple with whom CMF now lives (Mr. and Mrs. G). At Catholic Service's request, CAA signed a Relinquishment of Parental Rights. Catholic Services did not offer CAA the alternative consent to adoption form; neither did Catholic Services explain to CAA that Catholic Services would become CMF's legal custodian once a decree terminating CAA's parental rights was entered. Finally, Catholic Services did not inform CAA of the existence of her tribal organization, the Cook Inlet Tribal Council, or her right to be represented by her own attorney. The Cook Inlet Tribal Council (CITC) received no notice of the proceedings from any source and so did not intervene.

At the June 30 relinquishment hearing, the attorney for Catholic Services misinformed CAA that upon her signature CAA had only ten days to revoke her relinquishment of parental rights.[2] CMF remained in CAA's physical custody eleven days; CAA then physically surrendered CMF to Catholic Services, under the mistaken belief that she no longer could revoke her relinquishment of parental rights. The superior court entered a final decree terminating CAA's parental rights on July 15, 1986.

Subsequently, CAA began to put her life back together. She received assistance with her drinking problem, and in September 1986 stopped drinking and began outpatient treatment. In early 1986 CAA learned of the Cook Inlet Tribal Council through a television advertisement; she contacted the tribe for counseling and for assistance in regaining custody of CMF.

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[2] CAA was in fact entitled to revoke her relinquishment for any reason prior to the entry of a final decree of termination. *See* 25 U.S.C. § 1913(c); *In the Matter of J.R.S.*, 690 P.2d 10, 14 (Alaska 1984).

On March 26, 1987, Mr. and Mrs. G petitioned to adopt CMF, filing their petition in the relinquishment proceeding rather than commencing an independent adoption action. CAA filed a Revocation of Relinquishment the same day. CITC moved to intervene in the adoption proceeding May 7, and moved to set aside the termination decree pursuant to 25 U.S.C. § 1914. CAA and CITC raised numerous grounds for setting aside the decree including Catholic Services' failure to provide notice of the termination proceedings to the child's tribe. Thereafter the superior court issued a Memorandum Order and Decision vacating CAA's relinquishment of parental rights for Catholic Services' failure to notify the Cook Inlet Tribal Council of the voluntary relinquishment proceeding. In so holding the superior court stated in part:

> The tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding.

This appeal followed.

II. THE TRIBE'S RIGHT TO INTERVENTION UNDER § 1911.

In my opinion the court erroneously concludes that Congress did not grant tribes the right to intervene in voluntary termination proceedings. The text of 25 U.S.C. § 1911(c) is simply not supportive of the court's reading:

> In *any* State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at *any* point in the proceeding. (Emphasis supplied.)

Contrary to the court's apparent rationale, the tribe's right to intervene is not grounded upon a right to notice.

Rather, the tribe has a right to intervene at any point in any State proceeding regardless of the parents' consent. This right to intervene is absolute, as an instrumental part of the jurisdictional scheme "[a]t the heart of the ICWA." *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, ——, 109 S.Ct. 1597, 1601, 104 L.Ed.2d 29, (1989). To deny tribes this right in voluntary proceedings is to allow parents to defeat the Congressional scheme by usurping the tribe's equal interest in the Indian child. *Id.* —— U.S. at ——, 109 S.Ct. at 1610 ("[T]he tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.") (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986)); *see also Holyfield*, —— U.S. at ——, 109 S.Ct. at 1609 ("Congress determined to subject [placements of Indian children in non-Indian homes] to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents.").

III. THE TRIBE'S RIGHT TO NOTICE.

The ICWA thus confers upon tribes an unqualified right to intervene at any point in any State court termination proceeding. The ICWA does not, however, provide an unqualified tribal right to notice in every State proceeding. Rather, while § 1912(a) sets specific criteria for tribal notice in involuntary proceedings,[3] the statute is silent

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[3] 25 U.S.C. § 1912(a) provides:

> (a) *Notice; time for commencement of proceedings; additional time for preparation*
>
> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe can-

regarding notice to tribes when the State court deems the termination proceeding voluntary. Therefore we must look to the purpose of the statute to ascertain what Congress intended. *Cf. Holyfield*, —— U.S. at ——, 109 S.Ct. at 1606 (quoting *United States v. Pelzer*, 312 U.S. 399, 403, 61 S.Ct. 659, 661, 85 L.Ed. 913 (1941)). As the purpose of the ICWA is no less than to help Indian tribes preserve their identity,[4] I conclude that a tribal right to notice is necessarily implicit in the tribe's fundamental and unqualified intervention right under § 1911(c).[5]

The court deduces a tribal no-right to notice in voluntary proceedings from testimony before a House Subcommittee. In my opinion Congress responded to concerns expressed for parental privacy through the provision of 25 U.S.C. § 1915, which contemplates tribal participation in placement proceedings responsive to the particular needs of the child.[6] § 1915(c) requires courts to follow

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not be determined, such notice shall be given to the Secretary in the like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

[4] *E.g., Holyfield*, —— U.S. at ——, 109 S.Ct. at 1602 ("The ICWA thus . . . 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'") (quoting H.R.Rep. No. 95-1386, p. 23 (1978)) U.S. Code Cong. & Admin.News 1978, pp. 7530, 7545; 25 U.S.C. § 1901(3) ("there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

[5] *See also* 25 U.S.C. § 1911(a), (b) (detailing tribes' rights to exercise jurisdiction in custody-termination matters).

[6] 25 U.S.C. § 1915 provides in part:

(a) *Adoptive placements; preferences*

In any adoptive placement of an Indian child under State law,

tribe-set preferences, considering the preference of the Indian child or parent "[w]here appropriate," and app'ying the tribe's preferences while "giv[ing] weight" to parental requests for anonymity. § 1915 thus strikes a balance between parental anonymity and the tribe's interests by providing a mechanism by which the privacy of

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a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) *Foster care or preadoptive placements; criteria; preferences*

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) A member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) *Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences*

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

parents may be respected while the tribe's right to protect itself and its children is served. *See In the Matter of J.R.S.*, 690 P.2d 10, 14-15, 18-19 (Alaska 1984). In my view the powers given tribes by virtue of §§ 1911 and 1915 prove illusory unless the tribe is given notice of a voluntary termination proceeding.

In sum, "[i]t is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, —— U.S. at —— n. 24, 109 S.Ct. at 1609 n.24 (quoting *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (App.1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982)). The court's opinion today disenfranchises the tribe and disinherits[7] the Indian child by two pieces of paper—a consent form, and a state judge's certificate that the parent "fully understood" the consequences of her consent. 25 U.S.C. § 1913(a). I would not read the ICWA to be so readily circumvented. I would affirm the superior court's ruling.[8]

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[7] I refer to the child's potential cultural, not material inheritance. *Compare Holyfield*, —— U.S. at —— n. 24, 109 S.Ct. at 1609 n. 24 ("placements in non-Indian homes deprive[ ] the child of his or her tribal and cultural heritage") (quoting Senate Rep. No. 95-597, p. 45 (1977)) *with* AS 13.11.045(1) (posture of adopted children for interstate succession).

[8] Given this analysis of §§ 1911 and 1915, I find it unnecessary to address CAA's argument that tribes have a due process right to notice of voluntary termination proceedings under both the Alaska and United States Constitutions.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case No. 3AN-86-00394P/A

In the Matter of the Adoption of
[C.M.F.],
A Minor

RECOMMENDED DECISION AND ORDER

[Filed June 29, 1987]

The Cook Inlet Tribal Council has moved to intervene in this adoption on the basis that natural mother's consent to the voluntary termination of her parental rights did not comply with the certification requirements of 15 U.S.C. 1913(a). The motion to intervene was opposed by the petitioning adoptive parents.

The following facts are undisputed:

1. On June 30, 1986, natural mother, an Alaska Native, executed a Relinquishment of Parental Rights in open court before the Probate Master.

2. On July 14, 1986, the Probate Master certified that:

> Relinquishments were presented to [C.A.A.] and read by her, and the terms and consequences fully explained in detail to her in English. [C.A.A.] fully understood the explanation in English.

3. On July 15, 1986 a Final Decree terminating Ms. [A's] parental rights was entered which stated in part:

> It further appearing that the Relinquishment was read to [C.A.A.] at said hearing, and the terms and consequences fully explained in detail to her in English and that she fully understood the explanation in English:
>
> . . .
>
> It is hereby certified that the terms and consequences of the relinquishment were fully explained in detail to [C.A.A.] in English and that the explanation was fully understood by her in that language, . . .

4. Ms. [A] is an Alaska Native and is enrolled pursuant to Section 5 of ANCSA, 43 U.S.C. 1604, to the Cook Inlet Region. Ms. [A] is therefore an "Indian" for purposes of ICWA 25 U.S.C. 1903(3). A child of an Alaska Native who is an ICWA "Indian" is an "Indian child" for ICWA purposes. *D.E.D. v State*, 704 P2d 774 (Ak. 1985).

5. In this case Cook Inlet Tribal Council is the child's Indian tribe by designation for purposes of ICWA.

CONCLUSIONS OF LAW

1. Title I, Section 104(c) of ICWA, 25 U.S.C. 1914, authorizes the intervention of the Indian child's tribe at any point in any state court proceeding involving the termination of parental rights to an Indian child. Although a decree terminating her parental rights has been entered, Ms. [A] is seeking to set aside that Decree. Since Cook Inlet Tribal Council has a right to intervene at any point in the proceedings, it has the right to intervene during the post-decree relief stage.

2. However, although labeled a Motion To Intervene, the substance of Cook Inlet Tribal Council's motion is a request that the court invalidate the voluntary relinquishment of parental rights executed by Ms. [A] on the basis that the certification process required by 25 U.S.C. 1913(a) was not followed.

3. It is clear from the record in this matter that the required certification process was followed. Ms. [A's] relinquishment of parental rights is not invalid for failure to follow the certification process.

Based upon the above, Cook Inlet Tribal Council's Motion To Intervene is granted with the Council Directors to raise any further objections to the Termination Decree within 30 days. The Council's request that Ms. [A's] Relinquishment of Parental Rights be deemed invalid for failure to follow the ICWA mandated certification process is denied.

Objections to the foregoing must be filed within ten days of service.

DATE June 29, 1987

/s/ [Illegible]
Superior Court Probate Master

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

File No. 3AN86-394P/A

In the Matter of the Adoption of:

[C.M.F.]

ORDER APPROVING MASTER'S REPORT

The Master filed her Findings and Report in the above-captioned case on June 29, 1987, and copies thereof were mailed to counsel of record.

Objections have not been filed, pursuant to Civil Rule 53, and the time for objections has passed.

THEREFORE IT IS ORDERED that the Court approve the Findings of the Master.

DATED this 22nd day of July, 1987, at Anchorage, Alaska.

/s/ Victor D. Carlson
Superior Court Judge

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 3AN-86-394 P/A

In the Matter of the Relinquishment of
Parental Rights of

[C.M.F.],

and

In the Matter of the Adoption of

[C.C.G.],

Date of Birth: 8/10/80
A Minor.

MEMORANDUM OF DECISION AND ORDER

This case involves the selection of prospective adoptive parents by the mother through Catholic Social Services. On June 30, 1986 the mother executed a relinquishment of parental rights in court to the child born August 10, 1980. The child was left in the care of the mother until July 15, 1986, when the decree terminating parental rights was entered. The child was placed with the proposed adoptive parents in whose home she currently resides.

At the time of the relinquishment the mother specifically requested that her tribe not be notified and that termination of her parental rights and the placement of the child be confidential. The Catholic Social Services complied with her request and no notice was given to her tribe.

The mother and the Cook Inlet Tribal Council now object to the adoption of the child and seek the return

of the child to the mother. For purposes of this decision it is not disputed that the child is an Indian child.

The main issue before the court is the effect of the fact that the child's tribe was not notified of the termination proceeding and it is unnecessary to reach other questions.

The mother's consent to termination of her parental rights was voluntary pursuant to 25 U.S.C. § 1913.

The tribe contends that it was entitled to be notified of the pendency of the termination. The act does not specifically require notification in a voluntary termination case. The tribe bases its claim on the tribe's right to intervene "in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c).

The tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe, in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding. 25 U.S.C. § 1912(a).

Consistent with the purposes of the Indian Child Welfare Act "to protect the best interests of Indian children (removed from their families) and to promote the security of Indian tribes and families . . . and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . ." it is necessary that parents of Indian children be fettered in their right to place their children without the opportunity of their tribe to intervene and to assert its position in the matter. 25 U.S.C. §§ 1902 and 1911(c). See H.R. Rep. No. 1386, 95th Cong., 2nd Sess. 23, *reprinted* in 1978 U.S. Code Cong. & Ad. News 7530, 7546.

IT IS ORDERED that the decree terminating the mother's parental rights is set aside.

DATED at Anchorage, Alaska, this 24th day of June, 1988.

/s/ Victor D. Carlson
VICTOR D. CARLSON
Superior Court Judge

This is to certify that a copy of the above was mailed on the 24th day of June, 1988 to:

Robert B. Flint, Esq.
Lloyd B. Miller, Esq.
Sharon L. Gleason, Esq.
Philip J. McCarthy, Jr., Esq.

Ruth Willard rw
Secretary to Judge Carlson

IN THE SUPERIOR COURT
OF THE STATE OF ALASKA
THIRD JUDICIAL CIRCUIT

Case No. 3AN-86-00394-P/A

In the Matter of the Relinquishment of
Parental Rights to [C.M.F.],
A Minor.

FINAL DECREE OF TERMINATION OF PARENTAL RIGHTS

The petition of CATHOLIC SOCIAL SERVICES, INC., for a Decree of Termination of Parental Rights of [C.A.A.], came on for hearing on the 30th day of June, 1986 in Anchorage Alaska; and

It appearing that the minor child, [C.M.F.], was born on the 10th day of August, 1980, and, is now within the jurisdiction of the Court;

And it further appearing that the natural mother voluntarily signed the Relinquishment of Parental Rights at the hearing and said Relinquishment is now on file;

And it further appearing that the Relinquishment was read to [C.A.A.] at said hearing, and the terms and consequences fully explained in detail to her in English and that she fully understood the explanation in English;

And it further appearing that ten (10) days have passed since the Relinquishment was signed and that the rights of [C.A.A.] to withdraw the Relinquishment has expired; and

IT IS ORDERED, ADJUDGED AND DECREED that the petition of CATHOLIC SOCIAL SERVICES, INC.,

is granted and that the Relinquishment of Parental Rights is approved, and

IT IS HEREBY CERTIFIED that the terms and consequences of the relinquishments were fully explained in detail to [C.A.A.] in English and that the explanation was fully understood by her in that language, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parental rights of [C.A.A.] to [C.M.F.] are terminated effective as of this date.

DATED at Anchorage, Alaska, this 15th day of July 1986.

s Victor D. Carlson
Superior Court Judge

7-14-86
[Illegible]

INDIAN CHILD WELFARE ACT OF 1978
(EXCERPTS)
TITLE 25, UNITED STATES CODE

Section 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Section 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Section 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member of or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Section 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the

Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State Court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Section 1913. Parental rights, voluntary termination

(a) Consent, record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of pa-

rental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the

parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

Section 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Section 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which

the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Section 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreement may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.